

IN THE DISTRICT COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

FILED IN
3rd COURT OF APPEALS
~~AUSTIN, TEXAS~~

12/4/2018 3:42:56 PM

JEFFREY D. KYLE
Clerk

NO. 03-18-00650-CV

ALEX E. JONES, INFOWARS, LLC, FREE SPEECH SYSTEMS, LLC,
AND OWEN SHROYER
APPELLANTS

v.

NEIL HESLIN
APPELLEE

ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
53rd DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINGS PRESIDING

**APPELLEE'S RESPONSE TO APPELLANTS' MOTION TO EXPEDITE AND MOTION
TO ENLARGE LENGTH OF BRIEF AND APPELLEE'S MOTION FOR SANCTIONS
UNDER RULE 52.11**

For the parties and this Court, "it's like déjà vu all over again." Last month in another similar appeal, *Alex E. Jones, et al. v. Leonard Pozner, et al.*, Case No. 03-18-00603-CV, this Court denied an eleventh-hour Motion to Enlarge Length of Brief filed by the InfoWars' Appellants under identical circumstances. Like here, InfoWars also sought expedited consideration but did not identify any emergency other than its own briefing due date. Despite denial of that Motion in *Pozner*, InfoWars has filed an identical motion in bad faith, knowing there is no emergency justifying an immediate

response from Appellees and this Court. One violation of Rule 10.3's requirement of an "emergency" was frustrating enough, but InfoWars' second violation is the product of intentional bad faith, showing clear disrespect for this Court and Appellee.

BACKGROUND

This Court faced an identical motion and identical facts last month in the *Pozner* matter. Before filing its brief in *Pozner*, InfoWars sought and received an extension of time. Yet a few days before its extended due date, InfoWars filed an "emergency" Motion to Enlarge Brief and a Motion to Expedite. InfoWars claimed it needed to file an oversized brief because it intended to have this Court consider over 1,000 evidentiary objections. (See "Exhibit A," Appellants' Motion to Enlarge Brief in *Pozner*). The Motion to Expedite made no attempt at showing an emergency beyond merely stating that the Motion was being filed within days of the due date for InfoWars' brief. (See "Exhibit B," Appellants' Motion to Expedite in *Pozner*).

In response, the *Pozner* Appellees argued that InfoWars' "scorched earth" tactics were inappropriate and excessive. (See "Exhibit C," Appellees' Response to Motion to Enlarge Brief in *Pozner*). Appellees believed that InfoWars should comply with the word limit, especially since the appeal involved only a single motion at the outset of the case, and InfoWars did not carry the burden on that motion. Appellees argued that if Appellants had wanted to make extended arguments over a giant laundry-list of evidentiary objections, they should have sought timely relief instead of an eleventh-hour motion in violation of Rule 10.3.

Despite the denial of that Motion in *Pozner*, InfoWars has proceeded in the exact same manner here, filing a Motion to Enlarge three days before its brief is due after having already received an extension of time. Like the *Pozner* motion, InfoWars seeks this enlargement so that it can advance voluminous points of error which it has known about since the start of the appeal. Due to its last-minute request, InfoWars also filed another baseless Motion to Expedite without even a claim of an emergency. Once again, Appellees' counsel has been forced to abandon other matters so that a speedy response could be filed.

ARGUMENT

I. InfoWars Violated Tex. R. App. P. 52.11 by Again Seeking Expedited Consideration in Bad Faith.

There is no good cause for expedited consideration of the Motion to Enlarge Length of Brief, and InfoWars' Motion to Expedite was filed in bad faith. Under the Rules, the court "should not hear or determine a motion until 10 days after the motion was filed, unless...the motion is an emergency." *See* Tex. R. App. P. 10.3. Yet for the second time, InfoWars chose to interrupt Appellee's counsel and this Court with an emergency motion despite having no actual emergency in good faith. The only "emergency" cited in the Motion to Expedite is InfoWars' own briefing deadline, which had already been extended. There was no basis under the Rules to seek expedited consideration of the Motion, just as there was no basis in *Pozner*.

It is harassing to force Appellee's counsel to respond to yet another Motion to Expedite without even a fig-leaf attempt at showing an emergency. InfoWars filed its

Motion after 5pm on December 3rd, and it requests this Court rule on December 4th or 5th, so that it can meet its deadline of December 6th. Because Appellee's counsel will be occupied on December 4th, it has required counsel to work through all of Tuesday evening instead of spending time with family so that a response can be filed. And for what? There is no emergency, and not even a claim of one. But Appellee's counsel must hop when InfoWars says to hop.

"The Texas Rules of Appellate Procedure provide a tool for appellate courts to use in punishing lawyers who fail to deal in good faith with an appellate tribunal." *In re Colonial Pipeline Co., Texaco Inc.*, 960 S.W.2d 272, 273-74 (Tex. App.—Corpus Christi 1997). Rule 52.11 provides that "on motion from any party or on its own initiative, the court may — after notice and a reasonable opportunity to respond — impose just sanctions on a party or attorney who is not acting in good faith." *See* Tex. R. App. P. 52.11. This includes filing a petition with the Court "that is clearly groundless." *Id.* InfoWars knows its Motion to Expedite was groundless and that its own briefing deadline is not an emergency. Appellants have now twice abused the Rule in bad faith. This Court should impose just sanctions to address this conduct and remedy the burden wrongly placed on Appellee.

II. There is no Good Cause for an Enlargement.

InfoWars claims that it requires an enlargement of length for the same reason it claimed in the *Pozner* matter – it plans to file a "scorched earth" appeal in which it will allege that the Court erred in over one thousand evidentiary rulings. Though

InfoWars did not attach an exhibit setting forth its voluminous objections, as it did in its *Pozner* motion, its written objections to the *Heslin* trial court were even more excessive than *Pozner*, covering one-hundred pages. (CR 1922-2021). The trial court even noted the excessive volume of objections on the record. (RR 125:15-16) (“100 pages of objections, I might add.”).

Putting aside InfoWars’ inability to prioritize or argue its other positions in a concise manner, InfoWars has known well before it filed this appeal that it presented a conspicuously excessive number of objections to the trial court. This was a problem of its own creation. InfoWars could have filed a Motion to Enlarge from the start of this appeal, explaining to the trial court why it required extra space to argue a single preliminary motion where no discovery had even occurred. InfoWars should have also explained why it felt that it could credibly argue that a highly-distinguished trial judge committed over a thousand errors ruling on that single motion.

InfoWars argues its Motion to Enlarge should be granted because counsel for Appellee obtained an enlargement of words last month in the *Pozner* appeal. Yet Appellees’ request for enlargement in *Pozner* only became necessary because InfoWars, after having been denied an enlargement by this Court, evaded the Court’s limitations and advanced the same intended volume of objections by abandoning any semblance of prose. (See Appellees’ Response to Motion to Enlarge Brief in *Pozner*, “Exhibit C”). InfoWars’ brief contained page after page of bullet-point lists with no argument, directing the Court to nearly a thousand objections made in the record.

(*Id.*). Moreover, the *Pozner* Appellees – unlike InfoWars – made a timely, immediate request to the Court rather than an eleventh-hour motion after the expiration of a time extension.

CONCLUSION

The Rules emphasize the need for a succinct brief and a “concise argument for the contentions made.” *See* Tex. R. App. P. 38.1(i). Given the limited nature of these proceedings, a brief exceeding the word limitation will necessarily fail to “state concisely the nature of the case.” *See* Tex. R. App. P. 38.1(d). Parties routinely comply with word limits even when the subject matter of their cases are complex or when the procedural history is lengthy. Many parties must address an entire trial record while also incorporating their complaints about pre-trial proceedings, and they do so within word limits. InfoWars can clearly do likewise. But if they found it difficult to comply with the Rules, it was incumbent upon Appellants to seek timely relief. Instead, for the second time, InfoWars chose to interrupt Appellee’s counsel and this Court with an “emergency” motion despite knowing there was no emergency. InfoWars’ Motion was brought in a bad faith, and Appellee prays this Court enters sanctions to address InfoWars’ abuse of Rule 10.3.

Respectfully submitted,

KAster LYNCH FARRAR & BALL, LLP



MARK D. BANKSTON
State Bar No. 24071066

WILLIAM R. OGDEN
State Bar No. 24073531
1010 Lamar, Suite 1600
Houston, Texas 77002
Telephone: (713)221.8300
Facsimile: (713) 221.8301

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2018 the forgoing document was served upon all counsel of record via electronic service, as follows.

Via E-Service: *fly63rc@verizon.net*

Mark C. Enoch
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Ste. 500
Dallas, Texas 75254

A handwritten signature in black ink, appearing to read 'M. Bankston', is written over a horizontal line.

MARK D. BANKSTON

IN THE DISTRICT COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS

NO. 03-18-00603-CV

11/6/2018 5:21:29 PM

JEFFREY D. KYLE
Clerk

ALEX E. JONES, INFOWARS, LLC AND FREE SPEECH SYSTEMS, LLC

APPELLANTS

v.

LEONARD POZNER AND VERONIQUE DE LA ROSA

APPELLEES

ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
345TH DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINS PRESIDING

APPELLANTS' MOTION TO ENLARGE LENGTH OF BRIEF

Alex E. Jones, Infowars, LLC and Free Speech Systems, LLC, appellants, move pursuant to T.R.App.P. Rule 9.4(i)(4) for leave to increase the word count for their initial brief by 5,000 words to 20,000 words and to increase the aggregate total from 22,500 to 27,500 words. In support of the requested relief, appellants state:

1. In the trial court appellees filed 11 affidavits and declarations totaling 54 pages, excluding exhibits to the declarations and affidavits.

2. Because of the volume of affidavits and attachments filed by appellee, appellants filed numerous objections to these filings. A compilation of the objections to the specific filings is attached hereto as Exhibit A.

3. Appellee's affidavits and declarations were filed on the afternoon of July 25, 2018, leaving appellants only four business days to review them and prepare objections.

4. Though appellants twice formally requested that the trial court rule on the objections, it did not do so, thus now requiring that these objections be briefed for this Court.

5. The trial court based its ruling on something in the record. Tex. Civ. Prac. & Rem. Code §27.006(a) allows the trial court to consider the pleadings and affidavits on file. There is no means by which to determine what weight, if any, was given to which part of which of appellee's affidavits. Hence in order to not risk waiver of important and legally valid objections, appellants must adequately brief them.

6. This Court is not required to search the record to rule on the objections. Objections to TCPA affidavits must be addressed in the briefs. See *MVS Int'l Corp. v. International Advertising Solutions, LLC*, 545 S.W.3d 180, 191 (Tex. App. - El Paso 2017, no pet.) Because the appellants' objections must be addressed in their brief, and because of the number of objections, the rule-specified

word limit is inadequate.

7. Pursuant to Third Court of Appeals Local Rule 55, Appellants' Motion to Expedite the Court's ruling on this Motion to Enlarge Length of Brief is attached hereto as Exhibit B.

Based on the foregoing, appellants request that the word count for their opening brief be enlarged to 20,000 words and that the total page limit be increased to 27,500 words so that appellants' reply brief word limit shall remain at 7,500 words. As set forth in their Motion to Expedite, Appellants further request that this Court dispose of this motion on an expedited basis prior to the ten days required by Tex.R.App.P. Rule 10.3(a).

RESPECTFULLY SUBMITTED,

GLAST, PHILLIPS & MURRAY, P.C.

/s/ Mark C. Enoch

Mark C. Enoch
State Bar No. 06630360
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Telephone: 972-419-8366
Facsimile: 972-419-8329
fly63rc@verizon.net

ATTORNEY FOR APPELLANTS

CERTIFICATE OF CONFERENCE

I contacted Mark Bankston, lead counsel for appellee, by email on November 3, 2018 requesting his agreement to the enlargement of word-count requested herein. He responded by email on November 6 stating that he would need to confer with his clients and would respond on Wednesday, November 7, but because of the urgent nature of the relief sought, this motion is filed as opposed.

/s/ Mark C. Enoch
Mark C. Enoch

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2018, the foregoing was sent via efilexcourts.gov's e-service system to the following:

Mark Bankston
Kaster Lynch Farrar & Ball
1010 Lamar, Suite 1600
Houston, TX 77002
713-221-8300
mark@fbtrial.com

/s/ Mark C. Enoch
Mark C. Enoch

EXHIBIT A

Defendants made over 400 evidentiary objections to 82 specific statements by Zipp in his declaration (Objections are at CR:1408-1431; Zipp statements are at CR:896-921, with his Exhibits A-1 through A- at CR: 922-1093); almost 100 evidentiary objections to 16 specific statements in Binkowski's declaration (Statements are at CR:1115-1118; objections are at CR:1432-1440); almost 100 evidentiary objections to 29 specific statements in Pozner's declaration (Statements are at CR:1129-1131; objections are at CR:1443-1448); about 17 evidentiary objections to 21 specific statements in Armijo's declaration (Statements are at CR:1144-1148; the specific objections are at CR:1449-1150); about 55 evidentiary objections to 12 specific statements in Fredericks' declaration (Statements are at CR:1120-1127; specific objections are at CR:1450-1455); about 224 specific evidentiary objections to 59 specific line items statements in DeLaRosa's declaration (Statements are at CR:1133-1136; objections are at CR:1455-1468); made 101 evidentiary objections to 9 specific statements in Carver's declaration (Statements are at CR:1138-1139; objections are at CR:1468-1473); 5 objections to Clayton's declaration (Statements are at CR:1149 – 1151; objections are at CR:1441 – 1443); and 4 objections to 8 statements by Distephans (statements are at CR:1141-1142, objections are at CR:1473-1475).

IN THE DISTRICT COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

NO. 03-18-00603-CV

ALEX E. JONES, INFOWARS, LLC AND FREE SPEECH SYSTEMS, LLC

APPELLANTS

v.

LEONARD POZNER AND VERONIQUE DE LA ROSA

APPELLEES

ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
345TH DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINS PRESIDING

APPELLANTS' MOTION TO EXPEDITE

Alex E. Jones, Infowars, LLC and Free Speech Systems, LLC, appellants, move pursuant to Third Court of Appeals Local Rule 55 for the Court to dispose of their Motion to Enlarge Length of Brief prior to the ten days required by Tex.R.App.P. Rule 10.3(a). Appellants' said Motion to Enlarge is filed simultaneously herewith.

Appellants' brief is due November 14, 2018. In order to meet this briefing deadline it is necessary for the Court to rule on Appellants' Motion to Enlarge on

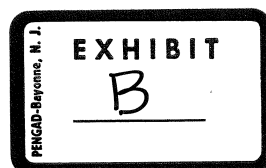


EXHIBIT A

an expedited basis.

Based on the foregoing, appellants request that this Court dispose of their Motion to Enlarge on an expedited basis prior to the ten days required by Tex.R.App.P. Rule 10.3(a).

RESPECTFULLY SUBMITTED,

GLAST, PHILLIPS & MURRAY, P.C.

/s/ Mark C. Enoch

Mark C. Enoch
State Bar No. 06630360
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Telephone: 972-419-8366
Facsimile: 972-419-8329
fly63rc@verizon.net

ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 2018, the foregoing was sent via efiletxcourts.gov's e-service system to the following:

Mark Bankston
Kaster Lynch Farrar & Ball
1010 Lamar, Suite 1600
Houston, TX 77002
713-221-8300
mark@fbtrial.com

/s/ Mark C. Enoch
Mark C. Enoch

IN THE DISTRICT COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS

NO. 03-18-00603-CV

11/7/2018 9:48:11 AM
JEFFREY D. KYLE
Clerk

ALEX E. JONES, INFOWARS, LLC AND FREE SPEECH SYSTEMS, LLC

APPELLANTS

v.

LEONARD POZNER AND VERONIQUE DE LA ROSA

APPELLEES

ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
345TH DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINS PRESIDING

APPELLANTS' MOTION TO EXPEDITE

Alex E. Jones, Infowars, LLC and Free Speech Systems, LLC, appellants, move pursuant to Third Court of Appeals Local Rule 55 for the Court to dispose of their Motion to Enlarge Length of Brief prior to the ten days required by Tex.R.App.P. Rule 10.3(a). Appellants' said Motion to Enlarge was filed on November 6, 2018.

Appellants' brief is due November 14, 2018. In order to meet this briefing deadline it is necessary for the Court to rule on Appellants' Motion to Enlarge on

an expedited basis.

Based on the foregoing, appellants request that this Court dispose of their Motion to Enlarge on an expedited basis prior to the ten days required by Tex.R.App.P. Rule 10.3(a).

RESPECTFULLY SUBMITTED,

GLAST, PHILLIPS & MURRAY, P.C.

/s/ Mark C. Enoch

Mark C. Enoch
State Bar No. 06630360
14801 Quorum Drive, Suite 500
Dallas, Texas 75254-1449
Telephone: 972-419-8366
Facsimile: 972-419-8329
fly63rc@verizon.net

ATTORNEY FOR APPELLANTS

CERTIFICATE OF CONFERENCE

Mark Bankston, counsel for appellees, has stated in Appellees' Response to Appellants' Motion to Enlarge Brief and Motion to Expedite filed November 7, 2018 that appellee is opposed to the relief sought. Therefore this motion is filed as opposed.

/s/ Mark C. Enoch
Mark C. Enoch

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2018, the foregoing was sent via efiletxcourts.gov's e-service system to the following:

Mark Bankston
Kaster Lynch Farrar & Ball
1010 Lamar, Suite 1600
Houston, TX 77002
713-221-8300
mark@fbtrial.com

/s/ Mark C. Enoch
Mark C. Enoch

IN THE DISTRICT COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

FILED IN
3rd COURT OF APPEALS
~~AUSTIN, TEXAS~~

11/7/2018 9:11:38 AM

JEFFREY D. KYLE
Clerk

NO. 03-18-00603-CV

ALEX E. JONES, INFOWARS, LLC, AND FREE SPEECH SYSTEMS, LLC
APPELLANTS

v.

LEONARD POZNER AND VERONIQUE DE LA ROSA
APPELLEES

ON APPEAL FROM CAUSE NUMBER D-1-GN-18-001842
345TH DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. SCOTT JENKINGS PRESIDING

**APPELLEES' RESPONSE TO APPELLANTS'
MOTION TO ENLARGE BRIEF AND MOTION TO EXPEDITE**

Appellees oppose Appellants' Motion to Enlarge Brief and Motion to Expedite, and would show the Court as follows:

I.

Appellees Leonard Pozner and Veronique De La Rosa brought defamation claims against Appellants Alex Jones, InfoWars, LLC, and Free Speech Systems, LLC based on their false allegations concerning the Sandy Hook Elementary School shooting. This appeal involves the trial court's order denying Appellants' TCPA motion. As such, the record is unusually thin. There has only been a single motion

filed with the court, a single response, and a single hearing. There is no discovery record.

II.

Appellants have already received an extension of time to file their brief, but they have nonetheless waited until the last minute to request this extension of word limitations. Due to their own delay, they now ask this Court to expedite its ruling, but Appellants gave no good cause for their late request. Under Tex. R. App. P. 10.3, the court “should not hear or determine a motion until 10 days after the motion was filed, unless...the motion is an emergency.” The only “emergency” cited by Appellants is their own briefing deadline, which has already been extended. There is no basis under the Rules to expedite consideration of this Motion.

III.

Despite their lack of diligence, Appellants claim they need to file an oversized brief because they seek to have this Court consider over 1,000 evidentiary objections to a mere 54 pages¹ of evidence submitted by Appellees. [See Appellants’ “Exhibit A”]. Appellants’ “scorched earth” tactics are inappropriate and excessive in light of the extremely limited record. Appellants should be capable of arguing against the denial of a single preliminary motion within the word limitations of this Court.

¹ It should be noted that many pages of the affidavits contain photographs and illustrations, while nearly a dozen more are signature or notary pages with little or no content.

IV.

The Rules emphasize the need for a succinct brief and a “concise argument for the contentions made.” *See* Tex. R. App. P. 38.1(i). Given the limited nature of these proceedings, a brief exceeding the word limitation will necessarily fail to “state concisely the nature of the case” or “state concisely and without argument the facts pertinent to the issues or points presented.” Tex. R. App. P. 38.1(d);(g).

V.

Parties routinely comply with word limits even when the subject matter of their cases are unusually complex or when the procedural history is lengthy. Many parties must address an entire trial record while also incorporating their complaints about pre-trial proceedings, and they do so within word limits. Appellants can clearly do likewise. Moreover, if Appellants intended to argue such a voluminous number of objections, they could have timely sought relief instead forcing Appellee to respond to this Motion on an expedited basis.

CONCLUSION

Given the unusually limited scope of this appeal, the lack of diligence in seeking the request, and the excessive nature of a brief with a thousand points of error, Appellees oppose any enlargement of this Court’s briefing limitations.

Respectfully submitted,

KASTER LYNCH FARRAR & BALL, LLP

A handwritten signature in black ink, appearing to read 'M. Bankston', is positioned above a horizontal line.

MARK D. BANKSTON

State Bar No. 24071066

WILLIAM R. OGDEN

State Bar No. 24073531

1010 Lamar, Suite 1600

Houston, Texas 77002

713.221.8300 Telephone

713.221.8301 Fax

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2018 the forgoing document was served upon all counsel of record via electronic service.

Via E-Service: fly63rc@verizon.net

Mark C. Enoch
Glast, Phillips & Murray, P.C.
14801 Quorum Drive, Ste. 500
Dallas, Texas 75254

A handwritten signature in black ink, appearing to read 'M. Bankston', is written over a horizontal line.

MARK D. BANKSTON